

instructive as to the conservative disinclination of the courts to depart from the delictual theory in respect of remedies generally. Plaintiff declared that the defendant 'undertook' in London to treat the plaintiff's horse for a certain malady ("assuma sur luy a curer son cheval d'un certain maladie"), and administered his remedies so negligently that the horse died. The defendant pleaded that the 'undertaking' was made at Oxford, and not at London. Plaintiff argued that the plea was bad because the action was brought for the negligence, and not on the undertaking. To this it was answered that defendant was not alleged to be a farrier by profession, and if there was no undertaking he acted gratuitously, and the action could not be maintained. This view was sustained by the court,—one of the judges observing that there was no actionable negligence unless there was a promise to cure. In this view, so far from the promise or undertaking creating a substantive right of action, it is merely an element of the remedy in Tort. It is worthy of remark here, however, that in *Coggs v. Bernard* (q) Powell, J., says that in the instance last cited the action was held to lie upon the undertaking; and that Holt, C. J., expresses the view that in such a case the confidence reposed by the plaintiff in the defendant's promise gives rise to a trust, but does not constitute a contract (r).

It is apparent, then, that the courts were in nowise departing from their former practice of taking cognizance of promises under seal only, when they adjudged that a recovery might be had for misfeasance in the execution of a parol undertaking. They looked upon negligence in the fulfilment of a trust or duty as the real gist of the action, and not the breach of the undertaking. But the time came, as it was bound to come in the development of English commercial life, when it began to be put forward that the neglect to perform a promise was something that the courts ought to take cognizance of as giving rise to a substantive right to relief, detached from considerations of any remedy in tort.

For a considerable time the judges of the Common Law courts withstood the demand for enlarging the domain of Procedure, and suitors were driven into Chancery to obtain their rights. The Chancellor proving complacent to the suitors, naturally enough the

(q) 1 Sm. Lead. Cas. (10th ed.) at p. 169.

(r) Ibid. at p. 181.